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A New Methodology for Improving EU Public Procurement Penetration, Visibility and Decision-Making

Stephen Clear, Gary Clifford, Dermot Cahill and Barb Allen¹

This article outlines a new framework for how SMEs and contracting authorities can take steps to increase cross-border procurement in the European Union. It offers new suggestions for improving SMEs chances of winning public contracts offered outside their immediate national border, and suggestions for reform in tender evaluation practices that could help SMEs overcome their aversion to “home bias” in public procurement. Despite longstanding legal harmonisation of EU public procurement rules and laws for over 30 years, there have been no significant improvements in the levels of cross-border public procurement activity, which remains stubbornly low. Within the EU there is a disconnection between globalisation trends and trends in cross-border public procurement within the EU. The process of creating common rules for the conduct of public tendering across the EU has failed to address the serious obstacles to cross-border procurement by a range of barriers, including Non-Tariff Barriers (NTB); the lack of obligation to require advertisement of non-threshold contracts on the EU’s own TED² tender portal; and contracting authorities’³ behaviour for preferring national suppliers.⁴ Although the statistical information explored within this article strongly suggests that current EU policies on transparency, competition, and openness are proving to be largely ineffective at transnational procurement level, our proposed action-based framework developed out of an EU-funded cross-border procurement research project, proposes a new way forward to address the limitations of the current EU Directives.⁵ Our proposed action-based framework identifies what actions need to be implemented in order to achieve the outcomes envisaged by 5 current European Commission recommendations for change.⁶ This, combined with the use of new intuitive and emerging technologies we suggest, could be a significant driving force for change in this area. Embracing new technologies in the fashion proposed by our framework, contract opportunities that seemed out of reach geographically,

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² Tenders Electronic Daily.

³ Concerning public procurement terminology, public bodies subject to the procurement rules shall be referred to as ‘Contracting Authorities.’ This term applies to all such bodies whether they are ‘central’, ‘sub-central’, or ‘local government’ bodies. Similarly, the term ‘economic operator’ is used throughout to refer to a business or other organisation which supplies goods, works or services within the context of market operations (including SMEs). The term is used in public procurement to cover suppliers, contractors and service providers.

⁴ EU strategies designed to level the playing field for SMEs competing for cross-border public contracts have been far less effective than in other areas of the EU’s borderless Internal Market where it has had a high measure of success.

⁵ Directive 2014/23/EU Concession Contracts, Directive 2014/24/EU Public Contracts Directive; and Directive 2014/25/EU on procurement by entities operating in the water, energy, transport, and postal services sectors. For analysis see: European Commission, ‘Thresholds’ (Europa 2018) at: <https://ec.europa.eu/growth/single-market/public-procurement/rules-implementation/thresholds_en> accessed 12/12/2019.

⁶ The Commission made 10 recommendations for change, our paper deals with 5 of them (the other 5 being outside our scope). The recommendations were made as part of the European Commission ‘Final Report: Advisory Expert Group on Cross-Border Access for SMEs to Defence and Security Contracts’ (Europa 2016) available at: <[https://eda.europa.eu/docs/default-source/documents/2016-11-29-final-report-and-recommendations---crossborder-smes.pdf](https://eda.europa.eu/docs/default-source/documents/2016-11-29-final-report-and-recommendations---crossborder-smes.pdf?)> accessed 27/12/2019; for commentary see R Williams, ‘Improving Access for SMEs to Cross-Border Defence Procurement’ (2017) PPLR NA41.

could imminently only become a click away.⁷ Finally, we also propose a “balanced scorecard tool” which allows some of the critical decisions an SME should address when pursuing a cross-border public procurement opportunities, to be guided by our mathematical model to help SMEs with better decision-making.⁸

1. Introduction

This article is divided into two broad parts: Firstly, an examination of the framework and regulation surrounding cross-border procurement, and why legal harmonisation has not facilitated more cross-border procurement. Such includes an analysis of how non-tariff barriers have continued to influence the cross-border procurement landscape. Secondly, an overview of our mathematical model that SME’s can utilise in order to execute ‘good’ decisions in cross-border procurement; whilst also setting out our action-based framework, which details what actions are needed to eliminate continuing obstacles to cross-border procurement, and thereby contribute to the completion of the European Union’s Internal Market objectives.⁹

In setting out a new action-based framework for how Small to Medium Sized Enterprises (SMEs) and public institutions, hereafter referred to as contracting authorities, can better reap the rewards of cross-border public procurement,¹⁰ we explore the tension between the low-levels of cross-border public procurement that currently takes place within the EU, and why, traditionally, such has been resistant to globalisation trends. Despite longstanding legal harmonisation within EU law,¹¹ in particular in promoting openness, transparency of opportunity, and prohibiting discriminatory practices that favour domestic SMEs¹², cross-border public procurement has remained low, with few signs of improvement. In exploring the reasons behind this, this article looks at the problem of non-tariff barriers, and how they can frustrate cross-border business, whilst also analysing new EU Commission proposals for reform.¹³

⁷ We propose how an upgraded geo-location tool, incorporated into TED, could significantly stimulate transnational trade, by making opportunities ‘over the border’ visible and easy for SMEs to find in a pictorial format. See Section 6.

⁸ This article also proposes evidence-led suggestions to help guide SMEs to make better decisions to boost their chances of the likelihood of winning public contracts in another jurisdiction, by utilising a consortium-based approach.

⁹ Sionaidh Douglas-Scott, *Constitutional Law of the European Union* (Pearson 2002) Ch 1 and C Harding, ‘The Identity of European Law: Mapping Out the European Legal Space’ (2000) 6 ELJ 128.

¹⁰ By strategically increasing the promotion of contracts to a wider audience, increasing the number of cross-border awards, a Contracting Authority can expect a rise in competition for its business, a situation that can stimulate an economy and gain benefit from comparative advantages and economic trade-offs that might not be available locally.

¹¹ Remedies Directives 89/665/EEC and 92/13/EEC, as modified by Directive 2007/66/EC, Directive 2014/24/EU and Directive 2014/23/EU. The EU Directives create harmonized rules that set out Member States’ obligations to promote and facilitate an open, fair, transparent markets. For example, for *all* (central and sub-central) works EUR 5,225,000; services concerning social or other specific services, EUR 750,000; supplies contracts: EUR 139,000. See: ‘Thresholds’ at: <https://ec.europa.eu/growth/single-market/public-procurement/rules-implementation/thresholds_en> accessed 9/9/2018.

¹² 8 objectives in public procurement include: value for money; avoiding corruption/conflicts of interest; accountability; equal opportunities/equal treatment for economic operators; fair treatment; efficient implementation of industrial, social, and environmental objectives; opening up public markets to Internal Market trade; and efficiency: S Arrowsmith ‘Public Procurement Regulation’ (Nottingham 2010) <<http://www.nottingham.ac.uk/pprg/documentsarchive/asialinkmaterials/publicprocurementregulationintroduction.pdf>> p 4 accessed 9/9/2018.

¹³ See: BBG and SKI ‘Support of the Internal Market Policy for Growth: Feasibility Study Concerning the Actual Implementation of a Joint Cross-Border Procurement Procedure by Public Buyers from Different Member States’ (EU Commission 2016) at: <<https://ec.europa.eu/docsroom/documents/22102/>> accessed 26/1/2017.

In 2004, the European Commission reporting on the *Functioning of Public Procurement Markets in the EU*¹⁴, stated that the level of cross-border procurement activity for direct cross-border awards stood at approximately 1.5% of the number of contracts awarded, and at 9% for indirect cross-border procurement awards.¹⁵ Ten years later, the percentage of contracts won by SMEs outside their home jurisdiction was seen to have remained largely static: at between 1.1% and 2.3% for direct awards, with indirect procurement evidencing a modest increase, yet plateauing at only around 11%.¹⁶

This article examines the reasons for this apparent stagnation of cross-border public procurement, which defies global trading behaviour and the notion that harmonisation of procurement regulation on an EU-wide basis would inevitably feed into the globalisation of trade and consequential growth of trans-national trade.¹⁷ Notwithstanding the aforementioned objectives of public procurement within the EU, and the operational behaviours of contracting authorities, it appears that, in reality, harmonisation legislation and the operational behaviours of contracting authorities, have both led to operational behaviour that is largely resistant to cross-border procurement and transnational trade.¹⁸

At this stage, to set the scene, we briefly describe why both of these developments frustrate the growth of more cross-border public procurement trade. First, EU procurement law harmonisation:

¹⁴ European Commission 'A Report on the Functioning of Public Procurement Markets in the EU: Benefits from the EU Directives and Challenges for the Future' (2004) at: <<http://ec.europa.eu/DocsRoom/documents/15446>> accessed 12/12/2017.

¹⁵ "Direct" cross-border procurement occurs when firms operating from their home market bid and win public contracts launched in another Member State. "Indirect" cross-border procurement occurs when firms bid and win contracts through subsidiaries i.e. when their foreign affiliates bid for tenders launched by authorities of a country different from the home country where the firm has its headquarters or where the parent company is located. More recently, EU Commission reports have reworded to describe indirect cross-border procurement as being where "the suppliers whom the public contract is awarded are located in the same country as the contracting authority, but the main responsibility for the delivery of the contract lies with a company based abroad". See: Kommerskollegium National Board of Trade Sweden, 'Cross-Border Public Procurement – An EU Perspective' (Kommerskollegium National Board of Trade Sweden, 2011) at: <[https://www.kommers.se/Documents/dokumentarkiv/publikationer/2011/rapporter/ Report%20-%20Cross-border%20Public%20Procurement.pdf](https://www.kommers.se/Documents/dokumentarkiv/publikationer/2011/rapporter/Report%20-%20Cross-border%20Public%20Procurement.pdf)> accessed 30/1/2017. In order to holistically analyse SMEs cross-border procurement activity, both definitions are important. Our definition varies with those who may explore these terms *from a buyers' perspective*: e.g., Sanchez-Graells' who focuses on collaborative approaches used by contracting authorities, whereas ours concentrates on collaborative methods *used to establish cross-border SME consortia* (A Sanchez-Graells, 'Collaborative Cross-Border Procurement in the EU: Future or Utopia?' (2016) 1 Procurement Law Journal 11).

¹⁶ The following reports were consulted in calculating this finding: Zornitsa Kutlina-Dimitrova and Csilla Lakatos, 'Chief Economist Note: Determinants of Direct Cross-Border Public Procurement in EU Member States' (European Commission Trade 2014) at: <http://trade.ec.europa.eu/doclib/docs/2014/july/tradoc_152700.pdf> accessed 3/9/2017; Ramboll Management Consulting and the University of Applied Sciences HTW Chur, 'Cross-Border Procurement Above EU Thresholds' (DG Internal Market and Services 2011) at: <<https://publications.europa.eu/en/publication-detail/-/publication/0e081ac5-8929-458d-b078-a20676009324/language-en>> accessed 18/1/2018; Lucian Cernat and Zornitsa Kutlina-Dimitrova, 'Chief Economist Note: International Public Procurement: From Scant Facts to Hard Data' (EC Trade 2015) at: <http://trade.ec.europa.eu/doclib/docs/2015/april/tradoc_153347.pdf> accessed 12/12/2017; PwC, ICF, GHK and Ecorys, 'SMEs' Access to Public Procurement Markets and Aggregation of Demand in the EU' (EC 2016) at: <<https://publications.europa.eu/en/publication-detail/-/publication/c0681db7-e56e-11e5-8a50-01aa75ed71a1>>, accessed 30/1/2018; and n 13.

¹⁷ A Ignatius, 'The Truth About Globalisation' (July 2017) Harvard Business Review 11; R Susskind and D Susskind, *The Future of the Professions, How Technology will Transform the Work of Human Experts* (OUP 2015); The Economist, 'Idea: Globalisation' (The Economist 2009) at: <<http://www.economist.com/node/14031230>> accessed 6/2/2018.

¹⁸ See: C Carboni, E Iossa and G Mattera, 'Barriers to Public Procurement: A Review and Recent Patterns in the EU' (Proxenter 2017) at: <[http://www.proxenter.it/public/proxenter/files/Procurement_Barriers_02_05_2017_FINAL\(1\).pdf](http://www.proxenter.it/public/proxenter/files/Procurement_Barriers_02_05_2017_FINAL(1).pdf)> accessed 30/1/2018, which supports this restrictive viewpoint and suggests a "greyness" to public procurement and government purchasing which actively distorts the market.

although EU procurement Directives¹⁹ prescribe in great detail how contracting authorities should conduct public procurements at every stage (all the way from their planning, advertising, specification and evaluation), such rules only apply to public contracts that are financially above the EU procurement thresholds, so-called “large” contracts.²⁰ Consequently, contracts with values below the Directives’ financial thresholds (so-called “small” contracts) are not subject to the extensive EU harmonised procurement requirements, save that their offering must comply with the General Principles of EU Law, principally the Principle of Non-Discrimination of grounds of Nationality and the Principle of Transparency.²¹ Consequently the harmonised EU-wide procurement legislation has limited reach: it only goes so far in remedying stagnant levels of cross-border public procurement, because it has little “reach” into aligning national procurement practices affecting sub-EU thresholds’ contracts, as it does the large contracts.

Second, so far as contracting authorities’ behaviour is concerned, there are significant problems remaining with their operational behaviour, particularly with their imposition of non-tariff barriers, and SMEs’ perceptions of ‘home bias’ within public procurement exercises.²² With this in mind our practical proposals for new frameworks, which are currently being piloted in five EU Member States, could be implemented more widely across the EU, to redress the law’s lack of reach to date within the European Union. If proven to be effective in promoting greater levels of cross-border procurement, the success of such could be guaranteed within the EU on a wider scale across the other 23 Member States and thereby eliminate the plethora of intra-jurisdictional, individual, national procurement portals for advertising below EU-threshold opportunities, by instead compelling contracting authorities to make all contracts transparently available via a new proposed ‘TED-Plus’ EU wide portal.²³

In 2016 the European Commission reported on the benefits of joint cross-border procurement for contracting authorities,²⁴ and subsequently via their Advisory Expert Group *again* took the opportunity to emphasise the importance of making cross-border procurement opportunities available to SMEs.²⁵ In doing so, the Advisory Group set out ten recommendations, and stated how all EU countries should endeavour to facilitate cross-border and SME participation in their public procurement exercises.²⁶ The research contained within this article responds to five of their

¹⁹ See n 5 and n 11.

²⁰ For analysis see: European Commission, ‘Thresholds’ (Europa 2018) at: <https://ec.europa.eu/growth/single-market/public-procurement/rules-implementation/thresholds_en> accessed 12/12/2017.

²¹ See: Albert Sanchez Graells, *Public Procurement and the EU Competition Rules* (2nd edn Bloomsbury 2015) Ch 1 Part IV.

²² See: Bernard M Hoekman, ‘Reducing Home Bias in Public Procurement: Trade Agreements and Good Governance’ (2018) 24 *Global Governance* 249; for perception discussions, see: Federico Trionfetti, ‘Discriminatory Public Procurement and International Trade’ (2000) 23 *World Economy* 57.

²³ See section 6.4.

²⁴ See n 13: the benefits identified include: reduced processing costs; more significant economies of scale; improved trade network to communicate industry best practices; supplier levels improved thus ensuring that difficult supply markets remained competitive; and planning methods for future projects were enhanced.

²⁵ n.6.

²⁶ *Ibid*. Their recommendations included providing early information about long-term plans and priorities; by using pre-procurement advertising, advertising procurement opportunities as widely as possible; and improving the quality of information in tender notices; and as far as possible, by designing public procurement procedures to facilitate cross border and SME participation; and by improving procurers’ skills and training for suppliers/providers.

recommendations, setting out proposals for how they can be achieved within the confines of the current harmonised legislative provisions.²⁷

The framework proposed at the end of this article, if implemented, removes some of the ambiguity and barriers linked to cross-border procurement, and enhances the legislative function of public procurement in the European Union (and further afield) through a new approach that is *deliberate, actionable, and measurable*.

2. Defining Public Procurement Within its EU Law Context

The European Commission describes public procurement as “the process by which public authorities, such as government departments or local authorities, purchase work, goods or services from companies.”²⁸ Within the European Union, the layers of complexity that govern the public purchasing process are harmonised within the respective public procurement Directives. The scale of public procurement expenditure in the EU amounts to approximately 2,406 billion Euros, which is equivalent to one-fifth of the EU's Gross Domestic Product.²⁹ The EU Directives seek to create harmonised rules that set out all Member States' obligations, including those to promote and facilitate open, fair, transparent competition, whereby any EU economic operator can bid for any contracting authorities' tenders, when the value is above the relevant size threshold.³⁰ This includes a legal obligation to evaluate the economic operators bid using transparent assessment criteria, without prejudice or discrimination. With each new EU Directive come claims of modernisation, greater clarity and flexibility, enhanced transparency, and legislative rules that promise to “level the playing field” for domestic and foreign suppliers.³¹ Yet, despite those ambitions, as the statistics earlier above demonstrate (and others below will confirm), SMEs are *not* increasing their level of cross-border public procurement penetration.

Unlike sub-threshold contacts, every threshold-sized contract must be openly advertised on Tenders Electronic Daily (TED).³² TED publishes around 520,000 procurement notices per year, including 210,000 calls for tenders. In 2005, it was estimated that the value of opportunities advertised on TED amounted to around €320bn, growing to approximately €450bn by 2010, with this figure remaining

²⁷ See Section, where we propose how 5 of the Commission's recommendations can be achieved. We do not consider the other 5 recommendations in this paper because they focus on issues related to training, subcontracting, and procurement planning, which are outside the scope of this article.

²⁸ European Commission, 'Public Procurement' (Europa 2018) at: <https://ec.europa.eu/growth/single-market/public-procurement_en> accessed 10/1/2018; and W Munchau 'Europe's Four Freedoms and Its Very Essence' (*Financial Times* 12/11/2017) at <<https://www.ft.com/content/49dc02dc-c637-11e7-a1d2-6786f39ef675>> accessed 30/1/2018.

²⁹ n 14.

³⁰ EU law sets minimum harmonised rules for tenders whose monetary value exceeds a certain amount and which are presumed to be of cross-border interest. The European rules ensure that the award of contracts of higher value for the provision of public goods and services must be fair, equitable, transparent and non-discriminatory. For example, the thresholds for central government works contracts are €5,225,000; for services contracts (non-subsidised) and supplies contracts €139,000 at Central Government. There are some variations for contracts offered by Sub-Central Government bodies. For lower value tenders, i.e. non-threshold contracts, national rules apply (nonetheless below threshold tenders are still expected to respect the general principles of EU law).

³¹ See: R Nielsen and S Treumer (eds.) *The New EU Public Procurement Directives* (Djøf Publishing Denmark 2005).

³² Tenders Electronic Daily, 'Supplement to the Official Journal of the EU' (Europa 2019) at: <<http://ted.europa.eu/TED>> last accessed 30/1/2019.

largely stable up to the present time (2019).³³ These indicator reports suggest that approximately *one quarter* of all EU based contracts are above threshold and advertised on TED, with the remaining *three quarters* being considered below-threshold, and are consequently advertised on a vast array of different regional and national portals only, or in some instances, not at all. It is in this latter area that EU harmonisation has had little impact in either reducing non-tariff barriers, or in reforming contracting authorities' individualistic and idiosyncratic procurement behaviours.

2.1 Static Levels of Cross-Border Public Procurement

In eliciting data from three major reports (GHK and Technopolis (2001-2004)³⁴; the European Commission (2007-2009)³⁵; and Carboni et al. (2013-2015)³⁶) figures for cross-border procurement across the now 28 EU Member States are estimated by the authors as follows:³⁷

Percentage of the Total Number of Awards										
Year 2000+	'01	'02	'03	'04	'07	'08	'09	'13	'14	'15
Direct cross-border procurement %:	1.1	1.5	1.5	1.9	1.6	1.8	1.4	1.9	2.3	2.0
Indirect through affiliates (rounded to the nearest %):	-	-	-	-	12	11	12	-	-	-

Table 1: Cross-Border Procurement Across the EU 28 Member States 2001-2015 by Percentage of the Total Number of Awards

'-' Denotes no data currently available

Contract Value						
Year 2000+	'02	'03	'04	'07	'08	'09
Direct cross-border procurement:	4.4%	1.2%	2.6%	3.2%	3.7%	3.6%
Indirect through affiliates:	-	-	-	13.9%	13.7%	12.4%
Indirect through sub-contractors/ consortia/ wholesalers/ distributors:	-	-	-	12.2%	12.2%	12.2%

Table 2: Cross-Border Procurement Across the 28 EU Member States 2002-2009 by Percentage of Contract Value

'-' Denotes no data currently available

Overall, analysis of these three reports illustrates that across the sample period (2000-2015), cross-border procurement within the EU has remained statically low for several years. This belief is synopsised by the European Commission itself in 2011, when it recognised that cross-border

³³ European Commission, 'Public Procurement Indicators 2010' (Europa 2010) at:

<<https://ec.europa.eu/docsroom/documents/15453/attachments/1/translations/en/renditions/native+&cd=2&hl=en&ct=clnk&gl=uk>> accessed 12/12/2019.

³⁴ GHK and Technopolis 'Evaluation of SMEs Access to Public Procurement Markets in the EU: European Commission, DG Enterprise and Industry 2010' (Europa 2012) at: <http://ec.europa.eu/enterprise/policies/sme/business-environment/files/smes_access_to_public_procurement_final_report_2010_en.pdf> accessed 17/12/2017.

³⁵ European Commission 'Final Report – Cross Border Procurement above EU Thresholds' (Europa 2011) at: <http://www.eipa.eu/files/topics/public_procurement/cross_border_procurement_en.pdf> accessed 12/12/2017.

³⁶ n 18.

³⁷ Note there are slight variations in the methodology adopted by the Carboni et al, the European Common and GHK and Technopolis in their respective reports. Nonetheless these figures provide an authoritative estimate as to the likely number of contracts won across an EU border during this period, as a working guideline. Note there are also variations in the number of States that joined the EU over this period, with Romania and Bulgaria joining in 2007, and Croatia in 2013.

procurement within Europe can be regarded as not as 'open' contrary to how it is portrayed.³⁸ Such a finding runs contrary to the earlier mentioned objectives and legal principles of the European Union (Non-Discrimination and Transparency), and does not contribute to the attainment of its Four Freedoms.³⁹ As can be seen in Table 1 and 2 above, only a small percentage of contracts are directly awarded across borders within the EU Internal Market. Between 2001 and 2015, the number of direct cross-border procurement awards made by Member States was approximately 1-2% of the number of contracts awarded (valued at between 1-4% of total spend across this period). By comparison, although a higher portion of contracts appear to have been awarded indirectly, via an affiliate, collaborator, or partner, accounting for 11-12% of public procurements on average between 2007 and 2009, it is noteworthy, even in this category of award, that the % awarded to foreign bidders using local affiliates is also very low in the overall scheme of things.

2.2 The Link Between Nation Size and Cross-Border Procurement: Small v. Big Countries

In conducting further analysis of the three above reports it can be concluded that smaller EU countries are more likely to award contracts to economic operators from other countries, when compared to larger EU nations. For example, the four most populous EU Member States, i.e., Germany, France, UK, and Italy, on average, only have cross-border penetration into their jurisdiction's public tendering activities of approximately 1% penetration each. By contrast, the four EU Member States with the lowest populations, i.e., Malta, Luxembourg, Cyprus and Estonia, have an average procurement penetration of approximately 12%. A further illustration of this point can be seen within the UK regions themselves. For example, within Wales, with an estimated population of approximately 3.1 million,⁴⁰ the Welsh public sector currently spends an estimated £6 billion on public goods, services and works.⁴¹ It has since been estimated that as much as 48%-49% of Wales' public procurement expenditure is with neighbouring territories, such as Ireland and England (via either direct or indirect cross-border procurement).⁴² Such findings are in support of Trionfetti's observations that a nation's public procurement budget in larger countries is more likely to generate larger scope for political interplay, for example through the generation of mutual non-tariff barriers, than that within smaller countries.⁴³

The three reports also indicate that, in general, there was a direct correlation between the number

³⁸ See: European Commission, 'Final Report – Cross Border Procurement above EU Thresholds' (Europa 2011) at: <http://www.eipa.eu/files/topics/public_procurement/cross_border_procurement_en.pdf> accessed 17/12/2018, and P Messerlin, 'Openness in public procurement markets: Time for a reality check' (ECIPE 2013) at <<http://ecipe.org/publications/openness-public-procurement-markets-time-reality-check/>> accessed 30/1/2018.

³⁹ Treaty Establishing the European Economic Community (The Treaty of Rome, as amended) 1957.

⁴⁰ Office for National Statistics, 'Population Estimates for UK, England and Wales, Scotland and Northern Ireland' (ONS 2016) at: <<https://www.ons.gov.uk/peoplepopulationandcommunity/populationandmigration/populationestimates/bulletins/annualmidyearpopulationestimates/latest>> accessed 1/2/2018.

⁴¹ Wales Audit Office, 'Public Procurement in Wales' (2017) at: <https://www.wao.gov.uk/system/files/publications/Public-Procurement-in-Wales-2017-English_0.pdf> accessed 1/1/2018.

⁴² Welsh Government, 'Opening Doors – The Charter for SME Friendly Procurement' (2016) at: <<http://prp.gov.wales/docs/prp/generalgoodsservices/280613openingdoorsenglish.pdf>> accessed 31/1/2018.

⁴³ Trionfetti also takes the view that cross-border procurement can be affected by: i) the size of government procurement, with developing countries being likely to generate larger scope for political interplay than in developed countries; ii) that discriminatory procurement may be perceived as a tool to protect domestic producers from a structural cost disadvantage; and iii) home-biased procurement may be perceived as a tool to counter hostile forces, n 22.

of contracts advertised by each EU Member State and the wealth of that specific country, unsurprisingly equating to wealthier countries (with higher levels of GDP) spending more via public procurement tendering exercises. However, our analysis also revealed significant differentiations amongst Member States as to the number of contracts they advertised across the EU via TED.⁴⁴ Since 2001 Italy, Spain, Germany and France have all been particularly active in advertising their public contracts via TED. However, it was the UK that opened its doors to the widest number of non-native economic operators in advertising twice as many contracts as France and Italy via TED, and nearly four times as many as Spain and Germany up-to 2010.⁴⁵ In analysing more recent activity on TED up-to 2015, it is evident that the advertised UK public procurement tenders are worth twice the value of France, four times as much as Germany and Italy; and eight times the value of Spain's tenders.⁴⁶

Nonetheless, even though France, Germany, Spain, Italy and the UK all advertise threshold contracts via TED, and have all agreed to the World Trade Organisation's Government Procurement Agreement,⁴⁷ all five countries have, nonetheless, been frugal in awarding contracts to non-native economic operators based outside their jurisdiction. Analysis of the three available reports indicate that these five Member States only spent between 0.6% and 2.3% of their public procurement spend with overseas companies over the last decade. By comparison, other smaller Member States, such as Ireland, Malta and Luxembourg, continue to award up to 25% of their government spend to economic operators located outside their jurisdiction.

For SMEs with aspirations of venturing into foreign markets, the above figures provide a useful benchmark, which can be used as a guideline as to where non-native economic operators are securing the highest portion of cross-border public procurement contracts. Such findings form the pre-text for our discussions as to the key decisions SMEs need to take when strategically bidding for cross-border contracts later on in this article.

3. The Unsolved Issues: Non-Tariff Barriers, SME Behaviours, Why Legal Harmonisation Has Not Facilitated Growth in Cross-Border Procurement, and Globalisation's minimal impact

Despite the legal harmonisation of public procurement rules for threshold value contracts, what we can extrapolate from the above, is that globalisation has not achieved the same operational and

⁴⁴ There were some noticeable differences in transparency of opportunities within the EU, for example in terms of publication rates of contract opportunities. Some MS published *a very high proportion* of their procurement opportunities (for example: Bulgaria (42 % in 2008; 34.8% in 2010; 47.1% between 2012 -2015); Cyprus (5.7 % in 2008; 49.1% in 2010; 28.8% between 2012 -2015); Estonia (43.5 % in 2008; 54.6% in 2010; 39.3% between 2012 -2015); and Latvia (61.1 % in 2008; 57.3% in 2010; 59.1% between 2012 -2015)). Whereas, other MS publish just *a small proportion* of their opportunities (for example: The Netherlands (6.7 % in 2008; 6.1% in 2010; 8.8% between 2012 -2015) and Luxembourg (9.2 % in 2008; 9.5% in 2010; 10.5% between 2012 -2015)). Among the large Member States, most published *slightly above the EU average*, currently approximately 17% (for example: France (21.1% in 2008; 18.3% in 2010; 17.0% between 2012 -2015); Denmark (18.7% in 2008; 25% in 2010; 33.1% between 2012 -2015) and the UK (21.4% in 2008; 28.2% in 2010; 29.6% between 2012 -2015)). Germany (at 6.9% in both 2008 and 2010, and 5.7% between 2012 -2015) stands out as publishing a *very small proportion* of its procurement opportunities.

⁴⁵ n 33.

⁴⁶ European Commission, 'Public Procurement Indicators 2015' (2015) at: <<http://ec.europa.eu/DocsRoom/documents/20679> > accessed 30/1/2018. This report estimates that between 2012 and 2015 the UK advertised on average €112.15bn per year on Tender Electronic Daily. France advertised on average €65.74bn, Germany €31.76bn, Italy €36.75bn, and Spain €17.87bn.

⁴⁷ World Trade Organisation, 'Parties, Observers, and Accessions' (2017) at: <https://www.wto.org/english/tratop_e/gproc_e/memobs_e.htm > accessed 5/1/2018.

economic efficiencies in cross-border public procurement when compared to what it has achieved in the private international commercial sphere for many years. Within the context of the EU, one reason for this could be because of the prevalence of Non-Tariff Barriers (NTB), and how they have been left largely unaffected by regulatory changes. The consequences of such are what should be exciting global propositions for industrious SMEs looking to grow their businesses and mitigate the risk of trading only within their domestic territory, is instead clouded by bureaucracy, red-tape, national legislation, and a plethora of physical barriers.

3.1 Non-Tariff Barriers Inhibiting Cross-Border Activity

While legal harmonisation in the EU has eliminated tariff-based barriers, NTB's continue to segment and restrict cross-border public procurement markets.⁴⁸ These policy-induced barriers can be categorised into three broad types.⁴⁹ Firstly physical barriers: whilst the EU has actively sought to remove obstacles pertaining to competing in other EU jurisdictions, some physical limitations still prevail and hamper cross-border trade, such as transportation, communication, physical condition, and the physical distance between the contracting authority and the economic operator.⁵⁰ Secondly, technical barriers: for example differing national product standards, or protectionist national public procurement policies, such as rules pertaining to transparency of supply chains, product origin, labelling and sanitary standards; "buy national/local" policies; restrictive licenses; environmental standards (for example, ISO 14001); intellectual property laws; and the operation of domestic subsidies.⁵¹ Thirdly, fiscal barriers: such as differing rates of VAT and excise duties cross-borders.⁵²

Evidence suggests that NTB's are increasingly becoming common in globalised and free trade economies, particularly in large and developed countries to protect their individual interests.⁵³ According to the European Commission, the number of NTB trade restrictive measures imposed by thirty-one of the European Union's trading partners have increased since 2008.⁵⁴ Similarly the World Trade Organisation has found that G20 members are introducing an average of seven restrictive trading measures per month.⁵⁵ In order to grow and realise the benefits of cross-

⁴⁸ Council Regulation (EC) No 2679/98 'On the Functioning of the Internal Market in Relation to the Free Movement of Goods among the Member States' (17th December 1998) OJ L 339/8, here the Commission implies that these physical barriers are a direct result of the actions of individuals and national authorities. For analysis see: Europe Economics, 'Optimal Integration in the Single Market: A Synoptic Review' (Gov.UK 2013).

⁴⁹ P Cecchini, M Catinat, and A Jacquemin, *The European Challenge 1992: The Benefits of the Single Market* (Gower Pub Co 1988) Ch 1.

⁵⁰ n 18.

⁵¹ HM Government, 'Review of the Balance of Competence Between the United Kingdom and the European Union: The Single Market' (2013) p 5, at: <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/227069/2901084_SingleMarket_acc.pdf> accessed 2/2/2018.

⁵² In addition to these three, others include quotas, embargoes, sanctions, levies, and other restrictions enforced within the individual Member State.

⁵³ SJ Rickard, and DY Kono, 'Think Globally, Buy Locally: International Agreements and Government Procurement' (LSE 2013) at: <<http://personal.lse.ac.uk/RICKARD/rio.pdf>> accessed 31/1/2018, where it is argued that discriminatory practices in procurement are near impossible to detect, and governments can always discriminate in new ways that are equally effective, but less obviously protectionist.

⁵⁴ European Commission, 'Trade and Investment Barriers and Protectionist Trends 2014-2015' (2016) at: <http://trade.ec.europa.eu/doclib/docs/2016/june/tradoc_154665.pdf> accessed 2/2/2018.

⁵⁵ World Trade Organisation, 'Report on G20 Trade Measures' (2017) at: <https://www.wto.org/english/news_e/news17_e/g20_wto_report_june17_e.pdf> accessed 27/9/2019. This has been a historic issue, as evidenced in a WTO world trading report, which concluded that NTB's can significantly restrict trade. Harmonizing trading standards is one way in which the negative effects of NTB's can be overcome. See: 'World Trade

border public procurement within the EU, SMEs need to be afforded a 'level playing field' across jurisdictions, and NTB's are inhibiting such.⁵⁶ There are currently too many variations within individual Member States, often found in the behaviour of contracting authorities.

The detrimental effect of NTB's can also be explained by the European Commission's Chief Economist report in 2017, which examined data from 1.8 million public contract awards.⁵⁷ The report concluded that many cross-border anomalies exist, such as an economic operators' bidding decisions being subject to 'border effects.' These included how distance had a strong negative impact on the likelihood of winning a public sector tender; and the perception of a 'home-bias' in the selection process. The report also found that the cross-border effects on goods, services, and works contracts varied significantly across the EU, notwithstanding that the higher the value of a contract seemed to correspond with decreasing concerns pertaining to awarding the contract cross-border. However, of greatest concern to SMEs trying to secure awards cross-borders, is that the report concluded that 'local' bidders were 900 times (!!!) more likely to be successful over a foreign economic operator.⁵⁸ SMEs concerns pertaining to this report will be further exacerbated by current Brexit uncertainties within the UK.⁵⁹

3.2 SMEs' Behaviour in Reaction to Home-Bias

Also of concern are SMEs perceptions of a climate that favours domestic economic operators. For example, the Chief Economist's report also found that trans-boundary movement is influenced by SMEs themselves, who are making a conscious decision not to pursue cross-border public procurement opportunities, primarily on the basis of 'home-bias' in the procurement selection process.⁶⁰ As detailed later on in this article, our framework proposes a new methodology that aims *to reduce the influence of biases in the tender selection and award process, and limit discriminatory behaviour* currently observed in the public procurement cross-border procurement process.

EU jurisprudence is clear that governmental agencies and public organisations cannot promote a 'buy-local' only policy within their procurement exercises.⁶¹ However, the problem of 'home-bias' is compounded by the practical reality of business-led agencies that instead take up the mantle and

Report: The Trade Effects of Non-Tariff Measures and Services Measures' (2012) at:

<https://www.wto.org/english/res_e/booksp_e/anrep_e/wtr12-2d_e.pdf> accessed 30/1/2018.

⁵⁶ French President Macron recently mooted a similar concept via his proposed 'Buy European Act,' i.e. EU legislation that would aim to harmonise trading behaviours across the then 28 Member States. See: Anne Sylvaine Chassany, 'Macron Pushes EU to Take Tougher Stance in Trade Talks' (*Financial Times* 17/10/2017).

⁵⁷ B Herz and X Irimia, 'European Commission: Border Effects in European Public Procurement' (2017) at: <<http://ec.europa.eu/docsroom/documents/26201>> accessed 25/1/2018.

⁵⁸ *Ibid.*

⁵⁹ Reports clearly indicate that beyond Brexit, a multitude of NTB challenges need to be addressed. See: European Parliament Think Tank, 'Briefing Paper: Understanding Non-Tariff Barriers in the Single Market' (2017) <[http://www.europarl.europa.eu/thinktank/en/document.html?reference=EPRS_BRI\(2017\)608747](http://www.europarl.europa.eu/thinktank/en/document.html?reference=EPRS_BRI(2017)608747)> accessed 30/1/2018; House of Lord European Union Select Committee, 'Brexit: Trade in Goods, Meeting Summary' (2017) at: <<https://publications.parliament.uk/pa/ld201617/ldselect/lddeucom/129/12908.htm>> accessed 2/2/2018, stating that NTB's pose a significant and costly threat to UK SMEs trade with the EU post Brexit, and that the UK should seek to achieve mutual recognition of cross-border trading standards, laws and recognition. For analysis see: C Giles, 'Post-Brexit Trade May Hinge on Non-Tariff Barriers' (*Financial Times* 18/12/2016).

⁶⁰ *Ibid.*

⁶¹ For example, see Case 7/68 *Commission v. Italy* ('Arts Treasures') [1968] ECR 423, where the Court of Justice considered the breadth of the prohibition of quantitative restrictions or measures to include those that exhibit a domestic bias.

heavily favour their domestic marketplaces.⁶² Further evidence of this behaviour has been found within the Great Britain, Northern Ireland, Australia, and Ghana.⁶³ From a cross-border perspective, protectionist strategies such as these have been recognised as promoting dangerous and restrictive behaviours that operate counter-intuitively to the EU's founding policy objectives to foster growth in the EU.⁶⁴ With this in mind, the new framework proposed within this article seeks to address national/local campaigns such as these that put non-native SMEs at a disadvantage.

3.3 A Lack of Cross-Border Transparency: Problems with Non-Threshold Contracts

One of the challenges for SMEs with high growth potential is the absence of a set of harmonised EU public procurement rules for contracts that are valued below the relevant Directives' thresholds.⁶⁵ For example, if a Contracting Authority wanted to issue a supply, services or design contract valued at €50,000, and a works contract valued at €1,000,000, they would not be required to publish either contract on TED, as they fall below the financial thresholds requiring publication of the contract across the EU. In many cases, national and regional laws may not compel contracting authorities to advertise their low-value contracts widely, if at all, further complicating the visibility of opportunities for SMEs and leading to greater complexities surrounding regional variations of processes and procedures within the EU Member States.

Although the EU Directives do not require public procurement contracts with values below the thresholds to be advertised,⁶⁶ the European Court of Justice (ECJ) has suggested that there *may be* a need to advertise such contracts, in one form or another, in circumstances where such contracts

⁶² Case 249/81 *Commission v Ireland* [1982] ECR 4005 gives us one of the first examples of this 'home-bias' which was condemned by the Court of Justice as far back as 1982. The Court of Justice held that the 'Buy Irish' campaign was illegal because it amounted to a measure of equivalent effect to a quantitative restriction prohibited by Article 34 TFEU (at the time, Article 30 EEC).

⁶³ Examples of 'buy local campaigns' include: In relation to the UK Government: Peter Melchett, 'New Plan for Food Procurement Encourages UK Government to Buy Local' (*The Guardian* 31/7/2014); In relation to UK Local Government see: Sue Oliver, 'Buy Local: A Guide to Doing Business with North West Leicestershire District Council' (BuyLocalGov.co.uk 2018) at: <https://www.nwleics.gov.uk/files/documents/buy_local_supplier_guide1/Buy%20Local%20Supplier%20Guide.pdf> accessed 1/10/2019; In relation to Australia see: Western Australia Government, 'Buy Local Policy' (Gov.Au 2002) at: <https://www.finance.wa.gov.au/cms/uploadedFiles/State_Supply_Commission/Policies/Buy_Local_Policy_July_2002.pdf> accessed 1/10/2019. A less subtle campaign was found in Northern Ireland where Belfast City Council stated within their Corporate Procurement Strategy that: "Council officers have begun ... breaking contracts down to suit small-to-medium sized businesses...where it makes sense to do so the promotion of a 'buy local first' approach" See: Belfast City Council, 'Draft Corporate Procurement Strategy 2014 - 2017' (Engineers Ireland 2014) at: <<https://www.engineersireland.ie/EngineersIreland/media/SiteMedia/groups/regions/Northern/Belfast-City-Council-draft-Corporate-Procurement-Strategy-2014-2017-Consultation-Draft-Procurement-Strategy.pdf?ext=.pdf>> accessed 31/1/2018.

⁶⁴ Peter Smith, 'Buy Local/National' Moves in Public Procurement Could Lead to Dangerous Protectionist Behaviour' (*Public Spend Forum Europe* 23/5/2017) at: <<http://publicspendforumeurope.com/2017/05/23/buy-local-national-moves-in-public-procurement-could-lead-to-dangerous-protectionist-behaviour/>> accessed 24/1/2018. For analysis of some of the objectives of procurement see: European Commission and PwC, 'Study on Strategic Use of Public Procurement in Promoting Green, Social and Innovation Policies' (Europa 2015) at: <<https://ec.europa.eu/docsroom/documents/17261>> accessed 1/10/2019.

⁶⁵ For analysis see: European Commission, 'Thresholds' (2018) at: <https://ec.europa.eu/growth/single-market/public-procurement/rules-implementation/thresholds_en> accessed 12/12/2017.

⁶⁶ *Ibid.*

could attract *cross-border interest*.⁶⁷ For example, in *TeleAustria*, *CoNaMe*, and *Parking Brixen*,⁶⁸ the ECJ held that although service concessions do not normally have to be put out to tender under EU Directives, obligations and public sector duties under the EU general principles of transparency and non-discrimination on grounds of nationality mean that the contract *may* have to be advertised when there is *cross-border interest*, so as to facilitate an opportunity to be open to competition, *and* in order to ensure that impartiality throughout the procurement process is observed.⁶⁹

Nonetheless, the ECJ have more recently clarified that cross-border interest should not be assumed in all below-threshold contracts, just because, for example, a non-native SME raises a complaint pertaining to such not being advertised. In *Commission v Ireland*,⁷⁰ the ECJ held that Ireland, which had not advertised a contract for the provision of welfare benefits as it was not obliged to do so under the Directives, was not in breach of the EU general principles of transparency in not advertising such an opportunity, as the European Commission had not demonstrated that a cross-border interest existed in this contract. The ECJ held that there should be no assumption that the contract would automatically be presumed as attracting cross-border interest. In order for the Court to hold otherwise, an applicant would have to show evidence that there would have been such cross-border interest. The ECJ also stated that the mere fact that a complaint was made by a foreign player was not, of itself, sufficient to demonstrate that the contract was a cross-border interest-type contract.⁷¹

If below-threshold contracts are to be advertised in circumstances where there is *cross-border* interest, concern must be had for the benefits of EU transparency rules.⁷² The EU Commission has

⁶⁷ This issue has risen particularly in relation to service concession contracts. A service concession is the award of a right to exploit a service and to derive remuneration from it on the part of the operator/provider of the service. Normally the relevant Procurement Directive will not require these kinds of service concessions to be put out to advertised competition, yet as we shall see, if the service concession would be likely to attract cross-border interest then the ECJ in its jurisprudence has indicated that it may have to be put out to competition, so that SME's from other Member States can find out about it. See: European Commission, 'Concession Contracts-Partnerships Between the Public Sector and A Private Company' (2019) at: <https://ec.europa.eu/growth/single-market/public-procurement/rules-implementation/concessions_en> accessed 1/10/2019.

⁶⁸ C-324/98 *TeleAustria* [2000] ECR I-10745; C-231/03 *CoNaMe* [2005] ECR I-7287; C-458/03 *Parking Brixen* [2005] ECR I-8612.

⁶⁹ In C-231/03 *CoNaMe* [2005] ECR I-7287 the Court held that if the principles of transparency were not observed, then the Internal Market provisions of the EU Treaties, such as the Free Movement of Services and the Freedom of Establishment, would be jeopardised, because potential bidders would not have the opportunity to express their interest in securing a service concession contract, unless an appropriate degree of advertising had brought *the existence of the contract* to their attention. This is significant because, the Directives which govern the award of these concessions allowed these concessions to be awarded *without* having to go out to advertised tender, and yet the ECJ has effectively, looked to the fundamental law of the European Union i.e. the Freedom of Establishment and Freedom of Services Provisions, allied to the General Principles of EU Law, such as the principles of Transparency and Non-Discrimination, to find that there should be a degree of advertising involved for such contracts if there will be no other way for a bidder from another Member State to express their interest in competing for such contracts (i.e. unless actually advertised).

⁷⁰ C-507/03 *Commission v Ireland* [2007] ECR I-977.

⁷¹ However, there are other ECJ judgments, such as those in Case C-226/09 *Commission v Ireland*, in which the Court did not seem to insist that (in order for a contract to be deemed one that was likely to attract *cross border interest*) that evidence of such would have to be shown. Of course, while two cases are distinguishable in the sense that in the first Irish case, C-507/03, the contract had *not been advertised*, whereas in the second case, C-226/09, the contract *had been advertised*, nevertheless it is not clear why *the substance* of the Court's judgment differs in both cases in terms of the legal test: in the former case the Court required evidence to be adduced that the contract would be likely to attract cross-border interest, whereas in the other does not go that far, hence it is difficult to see what is the actual test for establishing a cross-border interest.

⁷² For an overview of what the rules necessitate see: GH Addink and RJGM Widdershoven, *The Principles of Transparency in EU Law* (Uitgeverij BOXPress, 2013).

widely documented that a lack of transparency in the open advertisement of below-threshold public procurement opportunities facilitates an absence of competition in markets and lack of SMEs confidence in cross-border procurement opportunities and processes.⁷³ By contrast, the benefits of facilitating increased transparency not only benefit SMEs, but also extend to the contracting authority community, who can expect to benefit from increased competition, such as good and services at reduced prices; as well as increased levels of completion and innovation, and reduced levels of corruption.⁷⁴

Yet despite these widely documented benefits, ambiguity surrounding the transparency of practices remains. For example, HM Treasury concluded in a 2008 survey that SMEs felt that transparency of public contracts was still an issue, and as a result a fair, competitive environment was not being facilitated.⁷⁵ More recently, in 2017, the European Commission examined the lack of transparency in local and regional governments, and *argued against* the EU's public procurement regulatory framework, claiming that regulations in this area are vague, especially when they refer to the advertisement obligations of a contracting authority. In addition, the report also identified generally *weak* contracting expertise at local and regional level around the EU, which only added to the challenge. Consequently, the Commission concluded that political pressures applied at local and regional level by dominant parties, or other economic actors, had a significant influence on contracting authorities' approaches, thus impairing transparency of opportunities.⁷⁶

If we consider the financial value of opportunities advertised on TED (circa €450bn) and the fact that the public purchase of goods and services has been estimated to be worth 16% of GDP or approximately 2,406 billion Euros,⁷⁷ we can conclude there are significant opportunities for SMEs, if they are given the opportunity to access below-threshold contracts of cross-border interest.⁷⁸

3.4 The Disconnect Between Globalisation and Cross-Border Procurement in the EU

In this section we address the question: why has globalisation not changed EU cross-border public procurement patterns? The world has witnessed rapid internationalisation of markets and industries since the middle of the twentieth century.⁷⁹ Globally, we are trading on principles governed by the economics of comparative advantages, whereby one entity, region, or nation has a lower opportunity

⁷³ n 14.

⁷⁴ For further commentary see: Irena Georgieva *Using Transparency Against Corruption in Public Procurement: A Comparative Analysis of the Transparency Rules and their Failure to Combat Corruption* (Springer 2017) pp. 5-48.

⁷⁵ HM Treasury, 'Accelerating the SME Economic Engine: Through Transparent, Simple and Strategic Procurement' (National Archives 2008) at: < http://webarchive.nationalarchives.gov.uk/+http://www.hm-treasury.gov.uk/d/pbr08_economicengine_2390.pdf > accessed 1/2/2018.

⁷⁶ n 57.

⁷⁷ The European Commission estimates that 20% of this total is spent on purchases exceeding the value threshold set in the Public Procurement Directives, and in 2010 accounted for approximately 447 billion Euros from invitations to tender: EU Commission, *Annual Public Procurement Implementation Review 2012* SWD 2012 342 (2012) p 6.

⁷⁸ Some small, local, highly specific contracts would not be of interest to foreign suppliers, because of their limited nature and lack of operational margins (financial or otherwise). Nonetheless, it would be fair to say that some contracting authorities struggle with the definition of a contract being of 'cross-border interest,' an argument supported by: Andrea Sundstrand, 'The Transparency Requirement Based on Legal Principles- The Possibilities of Exceptions from the Requirements of Transparency when Awarding Public Contracts Covered Only by EU Primary Law' (2012) 3 International Public Procurement Association Conference Papers 810.

⁷⁹ E Olejnik and B Swoboda, 'SMEs' Internationalisation Patterns: Descriptives, Dynamics and Determinants' (2012) 29 International Marketing Review 466.

cost over their equivalent.⁸⁰ This has allowed organisations to exploit these comparative advantages, by offering goods, services, and works at more competitive prices and higher value.⁸¹ For private organisations, opportunities to access foreign markets has never been more abundant, yet such approaches towards globalisation are not replicated within the public procurement sphere.

Dixon eulogises globalisation as an unstoppable, productive force.⁸² A global movement that is the direct result of the free movement of capital, technology, goods, services, and information across national and international boundaries.⁸³ By contrast, Ghemawat and King are a little more sceptical about the future of globalisation.⁸⁴ They question how some leading nations and corporations are retracting from a globalised position, to instead one that is localised. Despite this, Dixon and Sigler predict that globalisation will continue regardless, motivated by the demand for increased global competition and lower profit margins, stimulated by growing economies such as India, China, and Brazil.⁸⁵

By linking globalisation trends with public sector opportunities for SMEs, researchers have sought to understand how businesses and economic operators are responding to opportunities to sell goods and services cross-border.⁸⁶ Olejnik and Swoboda empirically found three internationalisation patterns amongst SMEs: 'traditional,' 'born globals,' and born-again globals.'⁸⁷ Within their study, they compared modern SMEs with the same SMEs from ten years ago, and found that economic operators do change their operational behaviours in the face of new opportunities.⁸⁸ Engaging in cross-border procurement has the potential to empower SMEs to enhance their businesses, and thus increase their global potential by widening their international footprint. Yet, despite such expected benefits for both SMEs and contracting authorities, cross-border procurement in the EU remains at very low levels, for the reasons described above.

3.5 A Multi-Layered Solution to Low Cross-Border Public Procurement Levels in the EU

Therefore, in order to remedy this stagnation in cross-border procurement, this article proposes the use of new geo-location technologies that could help SMEs win a higher percentage of these types of contracts. Such advancements could be used to remove the predicted 'home-bias' from a typical

⁸⁰ See: Andrea Maneschi, *Comparative Advantage in International Trade: A Historical Perspective* (Edward Elgar Publishing Limited 1998).

⁸¹ See: S Senga, M Fujimoto, and T Tabuchi (eds), *Ricardo and International Trade* (Routledge 2017) Ch 1.

⁸² Patrick Dixon, *The Future of (Almost) Everything* (Profile Books 2015) p 8.

⁸³ See: B Axford, *Theories of Globalization* (Polity Press 2018).

⁸⁴ See: Stephen King, *Grave New World: The End of Globalization, the Return of History* (Yale University Press 2017) and Pankaj Ghemawat, 'Globalization in the Age of Trump' (2017) *Harvard Business Review* 112. These two authors are influenced by recent political shifts, which seem to advance policies that have a higher indigenous emphasis, such as Brexit in the UK (2016) and the electoral victory of President Trump in the USA (2017).

⁸⁵ n 82 and T Sigler, 'Trump and Brexit Won't Kill Globalisation – We're Too Far In' (*The Conversation* 2017) at <<http://theconversation.com/trump-and-brexit-wont-kill-globalisation-were-too-far-in-73688>> accessed 6/2/2018. These views are complimented by the Susskinds at n 17, who suggest that changes in regulation have also accelerated globalization.

⁸⁶ See: T Kontinen and A Ojala, 'Internationalization pathways for family-owned SMEs' (2012) 29 *International Marketing Review* 496; for a German case study see n 79; for an Italian case study, see: A D'Angelo et al, 'Geographical pathways for SME internationalization: insights from an Italian sample' (2013) 30 *International Marketing Review* 80; see also n 13.

⁸⁷ n 79. Detrimental to the SMEs climate, and ability to respond to these opportunities was: international orientation; growth orientation; communication capability; intelligence generation capabilities; and marketing-mix standardization.

⁸⁸ *Ibid.*

EU procurement evaluation process. Based on the advantages of increased competition, these proposals could help contracting authorities achieve better value in the delivery of goods and services. Furthermore, the balanced scorecard tool set out in this new framework would assist SMEs in deciding whether they should strategically bid for cross-border opportunities, whilst including a 'cross-border consortium-based' bidding strategy based on our action-based framework for maximising success in this area.

The authors formulated this new framework by analysing existing published works and legal provision analysis, as well as their empirical research conducted via the EU-funded Public Procurement and Cross-border Procurement (PPACT) and Winning in Tendering projects.⁸⁹ Such research included: empirical data concerning the barriers SME consortia face when seeking to bid for cross-border contracts, plus thirty semi-structured company interviews with leading public procurement officials, international trade representatives, and industry experts from across the European Union.⁹⁰

4. The Key Decisions for SMEs: Bidding for Cross-Border Procurement Contracts

From the statistics analysis exhibited elsewhere above, we have established that the likelihood for an SME winning a contract in a foreign jurisdiction is low. Having explored the reasons for barriers to SMEs participation in cross-border procurement opportunities, such as home-bias, NTBs and lack of transparency, this article now proceeds to propose a new methodology designed to empower SMEs in responding to these challenges, by providing them with a framework for making practice informed decisions as to whether to pursue cross-border opportunities or not. Furthermore, in order for SMEs to sustain and grow, our framework encourages SMEs to re-think their collaboration strategies, primarily because it can be challenging for small businesses to compete for contracts in a foreign jurisdiction in the absence of a local/native partner.⁹¹

Based on the need to mitigate barriers for SMEs in participating in cross-border opportunities, the authors' created the following phased 'Consortium-Based Approach Model' arising out of our work on the PPACT Project.⁹²

⁸⁹ PPACT (2017-18) was a five partner, €335,000 initiative, funded by the European Commission that aims to improve SME access to cross-border public procurement markets, in particular by focusing on what barriers need to be overcome by SMEs operating via bidding consortia in pursuit of cross-border public procurement opportunities. Winning in Tendering (2010-14) was a €3.7 million project funded by the European Regional Development Fund (ERDF) through the Ireland - Wales Programme (INTERREG 4A). The project was aimed at transforming the public tendering experience of Small Indigenous Suppliers (SISs include both SMEs and Third Sector organisations such as Charities).

⁹⁰ These interviews were conducted as part of the Winning in Tendering and PPACT projects.

⁹¹ An SME is 900 times more likely to win a local contract if it is in a bidding consortium with an indigenous economic operator. See n 57.

⁹² The 'Consortium-Based Approach model for the PPACT Project' was developed following research conducted with 30 SMEs and 4 government agencies from Italy, Spain, France and Ireland. Its purpose is to help SME bidding consortia make good cross-border decision, and effectively help them to pursue such opportunities. Note: the 'Consortia-Based Approach for PPACT Business Support Organisations' was generated from our work on PPACT, a cross-border tendering and business engagement project funded by the European Commission. This methodology is currently being utilised by governmental business agencies from four Member States including Ireland (City of Dublin), Italy (Venice region), Spain (Catalunya region) and France (Paris).



Diagram 1: Cross-Border Procurement-Consortia-Based Approach Model

The five-phase consortium-based cross-border approach above goes some way towards alleviating several of the issues that currently cloud cross-border bidding. For example, we have already demonstrated that *a collaborative approach is more successful* – a theme the consortia-based approach adopts. As we are also aware (from the EU Commission's Chief Economist) that domestic suppliers are 900 times more likely to win a contract at home than a foreign company - our phased approach *demand*s that a local bidder or a (local) government agency is part of an international consortium before a bid is submitted. The consortium-based approach, which is an integral part of the proposed methodology, also *demand*s that before submission, the application is peer-reviewed by a government agency outside the jurisdiction of the advertised contract to ensure international cross-border 'best practices' are considered. Moreover, by promoting a transnational partnership, comparative advantages linked to exchange of new cross-border ideas and innovations are encouraged, thus ensuring a value-added proposal is ultimately created.

Taking a decision on whether an economic operator should compete alone, or in collaboration, for an international contract poses difficult challenges. Such dilemmas open up several paths that require a detailed examination to understand the advantages and disadvantages of each pathway. When competing for a cross-border procurement opportunity in another jurisdiction we propose that an SME leader should consider: i) if they were to expand, which country would best suit their organisation; ii) which international market would their product or service best serve; iii) how quickly could the economic operator prepare to effectively compete for an international contract; and iv) would the economic operator need to establish a local base in that country, or could it collaborate with an existing native operator, in order to deliver the same, or a variation of, the product or service

currently offered at ‘home?’⁹³

*Finding and winning a public procurement opportunity therefore requires two different strategies and mindsets. SMEs must be committed to working internationally, and be open to working in a proactive consortium to reap the benefits of winning cross-border opportunities. By doing so, an SME can spread business risk, achieve levels of growth not possible by being restricted to a single market, improve financial performance, and boost their profile nationally and internationally.*⁹⁴

4.1 Cross-Border Procurement ‘Decision-Factors’: Driving ‘Good’ Decision Making

Following 30 semi-structured empirical interviews on the PPACT project with business leaders, trade organisations and contracting authorities, the following key decision-factors were identified:

Key Decision-Factors	
1.	Business profitability by its location: If an SME keen to venture into foreign territories, the cross-border statistics provided earlier could offer a useful benchmark when it comes to targeting specific nations. UK companies would be ill-advised to ignore opportunities in Ireland and France, and equally with some of the UK’s maritime neighbours, particularly as distance had a strong negative impact on the likelihood of winning a public sector tender. ⁹⁵
2.	The probability of winning an international contract in a foreign territory will include assessing or weighting: i) local market knowledge; ii) ability to respond to domestic policies; iii) understanding what the end customer requires. For example, has the firm conducted any market research in the region ?; and iv) the capacity to deliver the contract locally. For example, here a higher weighting may be applied if a partner company, or one of its affiliates, are within a certain proximity to the location of the contract. Furthermore, a lower number would be used if the company could not service the contract at ground level via one of its collaborators/affiliates (either directly or indirectly).
3.	The likelihood of finding a suitable local collaborator, if one does not already exist.
4.	The competence and location of staff to successfully deliver a contract in that other country.
5.	Benchmarking the product or service in comparison to local industry leaders, particularly if industry competitors are exploiting potential target markets. It is advised that business leaders carry out addition market research in the ‘target’ region before answering this scorecard item.
6.	The likelihood of success, especially when collaborating with an international partner. This measurement could be based on long-term gains such as the social, environmental, or economic benefits to all concerned parties.
7.	Calculating the value of the opportunity gained versus the chance lost, or a calculated payoff from taking such a risk.
8.	Security risks of working abroad.
9.	Political stability: this weighting could run in parallel to each country’s corruption index, as generated by

⁹³ Whilst all of these questions require a calculated thought-process, having the best intentions to collaborate/compete across a border can lead to unintended consequences that could positively/negatively affect the host, or indeed partners.

⁹⁴ ‘Facilitating SMEs Access to International Markets’ (Second OECD Conference of Ministers Responsible for SMEs 2004): <<http://www.oecd.org/cfe/smes/31919223.pdf>> accessed 1/10/2019.

⁹⁵ n 57.

Transparency International. ⁹⁶
10. The quality of data received post-market analysis: the reliability of this dataset could be measured, particularly as this data should quantify risk against entering a new market.

Table 3: 10 ‘Key Decision-Factors’ for SMEs engaging in Cross-Border Procurement Consortium

These ‘key decision-factors’ could be utilized by SME leaders in order to win a more significant share of a cross-border procurement contract.

4.2 A Scorecard System: A Mathematical Approach to Cross-Border Bidding

The authors propose that SMEs can respond to these ‘key decision-factors’ using a mathematical formula in the form of a likert-scales points based system, in order to quantify the choices, problems and opportunities available to them.⁹⁷ As every market and industry sector has its own peculiarities, SME leaders are invited to apply their own probability/bias/risk value to each of the ‘key decision-factors’ mentioned above, in order to assist business leaders in determining an appropriate course of action.

4.2.1 A Hypothetical Example of the Scorecard in Action:

Big Co. International specialises in the housing and assisted living sector. They are based in the UK and have had some experience of delivering public opportunities in Southern Europe, mainly in France and Italy. *Big Co.* are keen to expand their profile, and after consulting with various industry experts around Europe, they believe targeting public opportunities in Spain, Germany, and Ireland would be an attractive proposition for their growing company.

Based on market research *Big Co.* Company Directors are reasonably confident that their products and services will be sought after in all the countries identified. After a considerable amount of internal consultation, they believe that they have the resources to establish themselves in one of these markets, if the right opportunity presents itself. At the moment they don’t have a base in any of these jurisdictions, and would be heavily reliant on finding a trusted local partner to start any new venture.

Recently, a contracting authority from a region of Spain advertised an attractive housing and assisted living opportunity. Amongst other things, the tender sought an innovative consortium to deliver a wide range of products and services, most of which were well within *Big Co.*'s capabilities.

After consideration, one of *Big Co.*'s Bid Directors decided to complete the scorecard to determine the most appropriate course of action. Before starting the ‘decision-tool,’ the Director determined the threshold score the company would need to secure in order to proceed with the bid.⁹⁸

⁹⁶ Transparency International, ‘Corruption Perceptions Index 2016’ at:

<https://www.transparency.org/news/feature/corruption_perceptions_index_2016> accessed 17/12/2017.

⁹⁷ For the purposes of this article, in our version of this scorecard we have valued: ‘strongly agreeing’ (5 points); ‘agree’ (4 points); ‘neutral’ (3 points); ‘disagree’ (2 points); and ‘strongly disagree’ (1 point).

⁹⁸ In our hypothetical example the Director determined that if the scorecard totalled between 13-39 the opportunity would be passed over; if the scorecard returned a value between 40 and 50 the Director would examine the card in a little more detail and consider what areas required additional attention. In parallel to this exercise, the Director would consult

As can be seen in the following table, *Big Co.* achieved an encouraging score of 52. Nevertheless, *Big Co.* still had a fair amount of work to do, particularly as the scorecard picked up four elements that attained a value less than 4. Consequently, it would be in *Big Co.*'s interest to rectify these perceived weaknesses as early as possible, to avoid potentially failing in potential cross-border bids.

	Company Name:	<i>Big Co. International</i>				
	SME Country of Origin:	<i>e.g. UK</i>				
	Contract Opportunity Location:	<i>e.g. Spain</i>				
	Industry:	<i>e.g. Housing & Assisted Living</i>				
	Cross-Border Item / Area Examined	Strongly Agree (5 points)	Agree (4 points)	Neutral (3 points)	Disagree (2 points)	Strongly Disagree (1 point)
1	Do you believe the location of the contract can be profitable??	X				
2a	As an organisation do you possess the knowledge required to compete against domestic suppliers?		X			
2b	Do you believe that you have the capability to respond adequately to indigenous political drivers?			X		
2c	Do you understand what the Contracting Authority requires?	X				
2d	Do we have the capacity to deliver the contract locally?				X	
3	Do you believe that you have a reasonable chance of finding a suitable local collaborator, if one does not already exist.		X			
4	Do you agree that your team is able to successfully deliver a contract locally?	X				
5	Do you believe that your product or service in comparison to other industry leaders is attractive to the local market?			X		
6	Do you agree that the likelihood of success in the target regional is worth the risk?		X			
7	Do you agree that the opportunity gained versus the opportunity lost is a risk worth taking?			X		
8	Do you believe there is an acceptable security risk to your organisation as a result of working abroad?	X				
9	Is political stability of the target country acceptable?	X				
10	Is the quality of contract data received adequate?		X			
SCORE:		25	16	9	2	0
TOTAL SCORE:		52	/ OUT OF 65 (Scorecard Maximum)			

Table 4: Cross-Border Public Procurement - Balanced Opportunity-Based Scorecard

Our 'Balance Opportunity-Based Scorecard' and the 'Consortium-Based Approach to Cross-Border Bidding' are two components of our new proposed framework, both of which are now currently operational in five EU Member States, in the UK, Ireland, Spain, France, and Italy.⁹⁹ Both tools can be used to support SMEs pursuing cross-border public sector opportunities to increase (a) their cross-border *engagement potential*, and (b) their cross-border success rates, in order to overcome current

other team members and partners to see whether these areas of weakness could be overcome within a given timeframe. Alternatively, if the scorecard returned a value greater than 51, the Director would assimilate all the resources needed to offer an attractive proposal to the Spanish contracting authority.

⁹⁹ Currently operational in UK by the Institute for Competition and Procurement Studies; in Ireland by IDCP ConsultIRE a business association based in Dublin; in Spain by ACCIÓ a business development agency setup by the Catalan Government in Barcelona; in France by CCI Paris IdF, the Paris Ile-de-France Regional Chamber of Commerce and Industry; and in Italy by Unioncamere del Veneto EIC, a Veneto Chamber of Commerce.

cross-border trading perceptions and obstacles.

5. TED and The Proliferation of National Portals: Inhibiting Cross-Border Equality of Opportunity and Proposals for Reducing ‘Home-Bias’

Technology is being used by the EU to address some of the aforementioned cross-border biases within the EU’s Internal Market, with the concept being that electronic platforms have the potential to widen the accessibility of opportunities within a sustainable way, offering greater value for all stakeholders.¹⁰⁰ However, at present such is not being used to its full potential. For example, whilst there is an obligation upon contracting authorities to publish their above threshold contracts in the Official Journal of the European Union (OJEU),¹⁰¹ the volume of literature attached to each tender can be overwhelming, and in some instances surpass what is necessary for the economic operator to know, and instead become confusing, particularly for inexperienced SMEs seeking to bid for new cross-border opportunities. Even TED, the ‘go-to’ portal for economic operators interested in large public contracts across the EU has been heavily criticised by its users.¹⁰² Consequently, while TED is a significant tool when it comes to promoting the EU’s transparency agenda, at present it is (as demonstrated earlier above) only partially meeting this objective.

The issue of transparency of opportunities at cross-border procurement level via the use of technology is further complicated by many national governments developing their own intra-jurisdictional portals - these are a plethora of national websites that are currently advertising high volumes of domestic public contracts below the EU thresholds.¹⁰³ While advertising more domestic opportunities via national governmental portals is not illegal per se, as contracting authorities could be viewed as doing so with the intention of advertising their non-threshold level contracts as widely as possible so as to conform to national and primary EU legislation, clearly there is potential for a perception of ‘home-bias’ being suggested by intensely advertising such through domestic portals.

Furthermore, the use of national intra-jurisdictional electronic portals poses further complexities for SMEs in identifying relevant cross-border contracts. In recent years the number of such local,

¹⁰⁰ See: Abby Semple, *A Practical Guide to Public Procurement* (OUP 2015) Ch 3 and 6.

¹⁰¹ OJEU, ‘Public Procurement Thresholds’ (2017) at: <<https://www.ojec.com/thresholds.aspx>> accessed 12/12/2017. TED is used as the European portal to manage and advertise OJEU contract opportunities. All public opportunities advertised on the website are done so in a relatively consistent and structured manner.

¹⁰² In 2016 a TED user survey was completed by 2220 individuals. The following issues were recorded by participants: search facility and user friendliness has room for improvement; site is difficult to navigate; TED is visually unappealing; guidance documentation requires improving; contract notices difficult to find and process. See: Tender Electronic Daily, ‘TED User Survey 2016’ (2016) at: <http://user-surveys.publications.europa.eu/en/TED-user-survey-2016.html?WT.mc_id=TED> accessed 1/10/2019.

¹⁰³ It has been estimated that TED advertises contract opportunities circa. €450bn, and since the public purchase of goods and services has been estimated to be worth 16% of GDP, approximately €2,40bn, we can safely conclude that not all public contracts are available on TED. Due to the site’s scale, a simple opportunity search can yield tens of hundreds of returns. The European Commission’s Advisory Expert Group suggest that all (above and below threshold) contract advertisements should be advertised on as many portals and websites as possible, and firms should be provided with contract advertisements that are meaningful, accurate, easy to screen, in such a way that informed decisions can be made- which runs contrary to the analysis of users’ experiences today, as documented above. See n 6.

national, and international level electronic portals has substantially increased.¹⁰⁴ The result now being that the only practical way for such economic operators to identify cross-border opportunities is to register their company's information with TED, in addition to one or more national portals. For example, an SME in France interested in winning public contract opportunities in Ireland and the UK would have to register with TED in addition to entering their information on four national procurement portals in the UK, eSourcing NI in Northern Ireland, Sell2Wales in Wales, Contracts Finder in England, and Public Contracts Scotland in Scotland;¹⁰⁵ in addition to the single national portal in Ireland eTenders.¹⁰⁶

This additional burden, which is particularly cumbersome for SMEs with limited resources, could be viewed as running counter intuitive to the EU's transparency requirements under primary EU law, in particular those that are synonymous with the duty to make identification of cross-border opportunities easier. Currently, an SME is more likely to consult their own national domestic portal for public procurement opportunities, as the perceived simplest and most convenient option. To aide convenience, several national portals allow firms to actively bid on public opportunities via the portal itself. Occasionally, the electronic platform will point the searcher towards TED, however the majority of the advert information and operational bidding features are held locally on these domestic portals.¹⁰⁷

Owing to the increased prevalence of such electronic portals, the need to address their accompanying transparency-inhibitors, 'home-biases,' and barriers to SME participation become more pressing. Consequently, the authors recommend that TED should be upgraded to a 'TED-plus' portal. This is with a view to the portal becoming the only centralised portal for bidding for all EU based contracts- both above and below EU thresholds. Should 'TED-plus' be implemented, national portals should be confined to only advertising non-threshold opportunities and providing information on national policies and priorities. Thus containing all elements of the procurement bidding process within the central bidding systems of TED. Such a highly coordinated centralised approach to bidding for EU based contracts would go some way towards removing the 'home-bias' from the cross-border procurement process and would reverse the current flow of below-threshold information linked to public procurement away from national portals, instead ensuring the focal point remains 'TED-plus' with its openness and transparency actively working towards cross-border procurement. Our new proposed framework below presents a practical and technological answer as to how such high volumes of information could be presented efficiently and effectively. Our new proposed solution could extract contract information from TED and present this data in a new intuitive way, in order to overcome current deficiencies and criticisms of the current system.

¹⁰⁴ World Bank, 'Benchmarking Public Procurement: Assessing Public Procurement Regulatory Systems in 180 Economies' at <<http://bpp.worldbank.org/~media/WBG/BPP/Documents/Reports/BPP17-Executive-Summary.pdf>> accessed 22/12/2018.

¹⁰⁵ See: BravoSolution, 'eSourcing NI Portal'; Welsh Government, 'Sell2Wales Portal'; Public Contracts Scotland, 'Public Contracts Scotland Portal'; and 'England: Contracts Finder' (for an example of a portal publishing all Central Government contracts above £10,000, as well as the option for other UK public sector bodies to advertise their own contracts on it).

¹⁰⁶ For the Republic of Ireland: Irish Government, 'eTenders', which has been developed as part of the Irish Government's strategy for the implementation of e-procurement across the Irish public sector.

¹⁰⁷ For support see n 36.

6. Proposals for a New EU Wide Framework

For the above analysis, it is clear that the development and implementation of a new e-tool is needed to enhance SMEs ability to efficiently search for relevant cross-border contract opportunities. Such an e-tool also has the potential to assist contracting authorities in enhancing competition for their tenders. With this in mind, our new framework was designed with the purpose of strategically increasing the number of cross-border awards to help jurisdiction and contracting authorities reap the rewards linked to an increase in collaborative and competitive proposals, thus benefitting from a cross-fertilisation of ideas, which brings together innovations from industry to the public procurement arena. If this framework is adopted, our measures have the potential to reduce ‘home-bias’ in facilitating borderless approaches to public procurement within the EU Internal Market. Elements of our framework are unprecedented, for example, the introduction of a new cross-border policy, but are designed on the basis of radically influencing purchasing behaviours within public procurement marketplaces.

In order to fully understand the value of this Framework, one may compare such to the ten proposals for change made by the European Commission’s Advisory Expert Group in 2016.¹⁰⁸ Our framework is a direct illustration of how the European Union could practically implement five of those proposals, namely: i) advertising procurement opportunities as widely as possible;¹⁰⁹ ii) improving the quality of information in tender notices;¹¹⁰ iii) designing public procurement procedures to facilitate cross-border and SME participation;¹¹¹ iv) improving the Tender Electronic Daily (TED) website;¹¹² and v) the extended use of cooperative procurement.¹¹³

Our framework is broken down into four complementary action areas: Action 1: Cross-Border Procurement - A New Policy in Action; Action 2: Contracting Authority Behaviours; Action 3: SME

¹⁰⁸ Their recommendations included providing early information about long-term plans and priorities; by using pre-procurement advertising, advertising procurement opportunities as widely as possible; and improving the quality of information in tender notices; and as far as possible, by designing public procurement procedures to facilitate cross border and SME participation; and by improving procurers’ skills and training for suppliers/providers. See n 6.

¹⁰⁹ Our proposal encourages the increased advertisement of public procurement opportunities (especially those linked to cross-border procurement) in the following ways: By mandating the creation of a cross-border public procurement policy, which explains a Contracting Authorities cross-border trading position, these organisations should be more receptive to cross-border proposals (given the advantages discussed in this article). We recommend that Contracting Authorities advertise all above and below threshold opportunities on an upgraded TED or “TED-Plus”, in addition to the use of their national portals.

¹¹⁰ Our proposal will tackle this recommendation in two ways: firstly we recommend completely removing all public procurement jargon from all upcoming procurement advertisements; second, by improving the search facility on Tenders Electronic Daily (TED) by displaying only the most pertinent contract information on an interactive map.

¹¹¹ Our proposed framework will suggest that all Contracting Authorities implement a (for the first time) cross-border procurement policy that recognises the benefits cross-border trade offers; an upgraded TED display to show upcoming procurements on an interactive map, allowing new public sector opportunities to be readily found by their location; and TED to facilitate a procurement evaluation process that is conducted on a ‘Nationality Blind’ basis.

¹¹² Our framework describes a number of new features that upgrades TED into a more intuitive, functional, and centralised portal, which improves the transparency of contracts arising “just across the border.”

¹¹³ The framework below introduces a proven cross-border consortia-based approach to bidding for public contracts and in-parallel introduces a mathematical scorecard to help SMEs make “better decisions” when pursuing opportunities in other jurisdictions. Note: we do not consider the other five recommendations in this paper because they focus on issues related to training, subcontracting, and procurement planning, which are outside the scope of this article.

Cross-Border Performance; and Action 4: TED-Plus- Transparency, Intuition and the Removal of Home Bias.



Diagram 2: A Pictorial Illustration of Our New Framework
Cross-Border Procurement-A Framework for Success for SMEs and Publicly Managed Institutions

To complement the illustration above, the following matrix details recognised problems, and matches such to an evidence-based solution to the issue, followed by who must change, and how (i.e. what behaviour changes are needed) in order for the action to be considered successful (i.e. macro impacts):

The Problem	Action (Our Solution)	Who must change	Behaviour Change	Macro Impacts
No national policies to counteract NTBs	Adopt Cross-Border Procurement Policies [Action 1]	Contracting Authorities across EU Member States	SME perception of home-bias changes from “negative” to “neutral” to “positive”	More cross-border procurement due to SME increased cross-border activity & completion of Internal Market objectives. ¹¹⁴
SME perception (and statistical reality) of ‘home-bias’ leading to low cross-border procurement contract awards ¹¹⁵	Make Evaluation Process Nationality Blind [Action 2]	TED & Contracting Authorities across EU Member States	National Governments and EU Commission receptive to new merit-based approach	NTB barriers reduction facilitates more SME cross-border procurement activity, which promotes greater competition ¹¹⁶
Low cross-border procurement success rates in ‘direct’ and	Mandatory Invitation of Consortia Bids [Action 2]	Contracting Authorities across	SMEs see active encouragement of bidding	Increased success rates for indirect awards arising from a

¹¹⁴ n 80.

¹¹⁵ n 57.

¹¹⁶ n 81.

'indirect' procurement		EU Member States	consortia and invitations to participate	greater number of cross-border procurement bidding consortia
Resistance of EU National procurement markets to globalisation	Removal of NTBs [Action 2]	National Governments	Removal of NTB barriers lead to increased cross-border procurement activity ¹¹⁷	National action achieves removal of NTBs (which Legal Harmonisation at EU level failed to achieve) ¹¹⁸
SMEs lack of awareness of key "No Go!" / "Go! Go!" factors	Employ Scorecard Methodology to Support "Good" Cross-Border Procurement Decision Making [Action 3]	SMEs	Better SME decision-making leads to more informed strategic cross-border "No Go!" or "Go Go!" decisions	SMEs enabled to make sound decisions on whether to compete for particular cross-border opportunities, or not
SMEs lack of awareness that consortia-bidding leads to significantly higher cross-border procurement award success rates	Understand Joint Bidding Success Rates [Action 3]	Contracting Authorities across EU Member States & SMEs	Contracting Authorities receive more cross-border bids involving indigenous and "foreign" EU SMEs	Contracting Authorities gain multiple benefits arising from SME cross-border bidding consortia , e.g., better value, more innovation ¹¹⁹
Lack of cross-border tender opportunities 'visibility' to SMEs due to proliferation of multiple national tender portals	Create TED-Plus: An Intuitive, Centralised Contracts Search and Delivery Engine [Action 4]	Tenders Electronic Daily (TED)	Upgraded TED-Plus with enhanced 'tender-visibility' functionality	SMEs will be able to easily "see" where cross-border procurement opportunities are arising "just across the border"
Lack of accessibility for persons of low literacy attainment	Remove Public Procurement Jargon from tender documentation [Action 4]	Contracting Authorities across EU Member States & Tenders Electronic Daily (TED)	Subject all tender documentation (including advertisements) to literacy and 'readability' tests.	SME personnel with average to low literacy skills to no longer find tender documentation inaccessible
Proliferation of tender portals obscures tender 'visibility' across the EU	Downgrade National Portals / Upgrade TED [Action 4]	EU Public Procurement Transparency Legislation required	EU Commission / EU Council of Ministers to revise EU procurement legislation.	Confine National portals to advertising function only, with reference back to TED-Plus for Nationality-Blind bid submission function; plus ensuring that SMEs can "see" all cross-border procurement opportunities, on a single portal, eliminating the lack of transparency currently arising from a multiplicity of national portals

Table 5: A Framework for Problems and Solutions for SMEs

The commentary below provides further insights as to what is required at each of the four action stages by the key stakeholders.

6.1 Action One: Cross-Border Procurement- A New Policy in Action

¹¹⁷ n 53.

¹¹⁸ n 55.

¹¹⁹ n 14.

Action one facilitates the adoption of cross-border procurement policies. This is with a view towards aiding the completion of the EU's Internal Market, and given the importance of globalisation and cross-border procurement, all contracting authorities, whether central, sub-central, or municipal, should have a written policy that explains their trading position when it comes to cross-border acquisition of goods and services; detailing what steps they have taken to facilitate cross-border access; publish the number of cross-border bids they receive each year, and how many were successful. This national system should reflect the current state of play, identify areas of the supply market that require improving, set realistic targets to increase the promulgation of cross-border procurement, and where possible enhance communications between contracting authorities and SMEs by adopting the subsequent actions that follow.

6.2 Action Two: Contracting Authority Behaviours

Action two proposes making evaluation processes nationally blind. At selection stage, and where possible, up to the contract award stage, contrary to current EU-wide practice, all documentation should be evaluated 'nationality blind.' This process would ensure that the 'home-bias' trend is *eliminated* from the evaluation process and ensure that all proposals are evaluated on their fitness to deliver the contract successfully. It is recommended that the *bidder's country of origin and location information* should only be revealed at the contract award stage. Couple with this should be a mandatory invitation of consortia bids. All threshold level contracts should be automatically obliged to explicitly invite consortia bids, unless a practical rationale can be provided for not doing so. This sub-action will allow Contracting Authorities to reap the rewards linked to a cross-fertilisation of ideas, industry innovations, and at the same time send a positive signal to foreign SMEs that consortia bids are welcome. Finally, provision should be made for the removal of NTBs. The European Commission has stated that there are still cross-border procurement barriers in place as a direct result of the actions of individuals or national authorities.¹²⁰ Therefore, significant work should be focused by the Union on removing the physical costs of bidding for an SME. For example, during the bidding process Contracting Authorities should eliminate the need to travel to tender commencement events and utilise all forms of electronic communication where possible.

So as to ensure the success of the second action stage, we recommend that every contracting authority should: i) adopt and publish on TED a written cross-border public procurement policy that explains their transnational trading position (in line with action one); ii) invite consortia bids for all public sector contracts (unless an objective justification exists for doing otherwise) and where possible remove the cost of bidding (in support of action three); and iii) endorse action four by mandating an inclusive approach to cross-border tendering, thus ensuring a centralised EU advertising, bidding and evaluation portal is at the heart of the procurement process.

6.3 Action Three: SME Cross-Border Performance Score Card Methodology

At action stage three it is recommended that stakeholders employ our scorecard methodology so as to support 'good' cross-border decision-making, in utilising the decision-making capabilities the balanced scorecard offers, particularly when targeting transnational public opportunities.

¹²⁰ n 48.

Furthermore, as analysed within this paper, in order to compete effectively, SMEs must be open to bidding in a cross-border consortium and understand joint bidding success rates.

As public procurement is a two-way transaction it is vital that all SMEs: i) Understand the political drivers behind action one and be open to the liberalisation of cross-border procurement; ii) welcome increased competition in the public procurement marketplace (in a similar way to how globalisation is affecting other parts of the economy) and work collaboratively with other SMEs to deliver solutions for the benefit of the economy (in-line with action two); and iii) utilise action four by using an intuitive centralised TED-Plus resource for public procurement. This new tool will enable SMEs to make quick decisions on new cross-border opportunities; increase their sources of revenue; spread the risk of competing in a single region or nation; and readily identify new contract opportunities in other jurisdictions.

6.4 Action Four: TED Plus- Transparency of Opportunity, Intuitive Platform, and the Removal of Home-Bias

Stage four action identifies the need for an electronic intuitive, centralised contract search and delivery engine. Our research has identified the need to upgrade TED to be a more intuitive searching platform. TED-Plus would encourage a higher number of SMEs to come forward and bid on transnational procurement opportunities. For example, the use of a geo-location tender mapping service would have the ability to condense a vast amount of data and display only the salient information on a single page. By presenting this information on an interactive map, each point on the map would (unlike presently) display only the most pertinent information – such as the contract location (represented by a pin on a map), contract value, contract sector, and a brief opportunity description. If more information is required a clickable link could be provided to the main text. An example of this feature can be seen in the two images that follow:

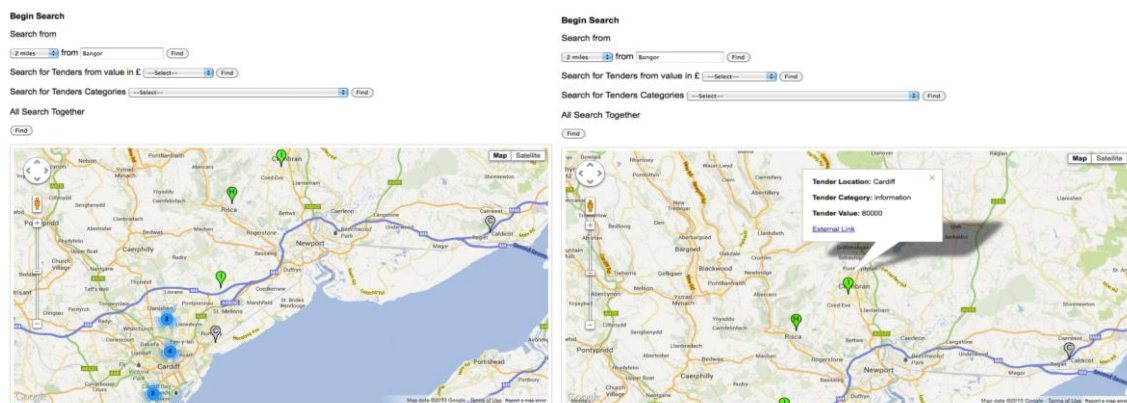


Diagram 3: A Pictorial Illustration of How 'TED-Plus' could make Cross-Tenders 'Visible'

In support of the action required at stage four, we recognise the need to remove public procurement jargon from all contract advertisements, which would go some way towards appealing to a broader business audience. For example, by analysing over fifty public procurement tender documents and information related to the advertisement of a public sector contract, authors Clifford and Cahill found in a study in 2007 that the readability (i.e. the ease which a reader can understand a written text) of

such documentation was at a highly advanced level of reading.¹²¹ In comparison, most SMEs linguistic capabilities are akin to most readers of UK newspapers,¹²² namely their level of linguistic dexterity is thought to be at a primary or intermediate level of reading, indicating that there is a definite *communication disconnection* between Contracting Authorities and their intended supply base, in terms of the highly technical language currently prevailing in the public contracts world.

In order for the above proposed extensions of TED to be successful, there is a need to reverse the shift towards national portals for below-threshold contracts. The functionality of all national portals should be downgraded to that of an advertisement and policy display portals, which in future is heavily connected to TED-Plus: all public procurement tenders (above and below threshold) should be advertised centrally via TED-Plus and this centralised system should be upgraded to accommodate the entire bidding process as well. Such a policy change should be guaranteed by legislative reform, compelling EU Member States to follow such actions. If fulfilled, this pan-European portal will help remove the '*home-bias*' phenomenon, as bidders will be more encouraged to go outside their immediate jurisdictions and seek cross-border opportunities.

In order to make sure the TED's upgrade fully complies with the EU's transparency agenda, the centralised portal should respond to the needs and policies identified by contracting authorities in action one. As well as, support the cross-border procurement agenda by making it easier for contracting authorities to carry out the public procurement bidding process 'nationality-blind', thus ensuring all bids are won on merit (thus supporting action two). And finally, consider how SMEs use the portal to identify and win cross-border opportunities, and how the portal could support the cross-border collaboration process (which is in-line with action three).

7. Concluding Thoughts

This article has outlined a new framework for how SMEs and contracting authorities can jointly benefit from increased cross-border procurement, while offering some new suggestions for improving SMEs chances of winning public contracts offered outside their immediate national border. Our action-based framework then identifies what actions need to be implemented in order to overcome these problems, whilst also facilitating a deliverable action plan in order to achieve five of the most important European Commission recommendations for change.¹²³

Despite longstanding legal harmonisation of EU public procurement rules and laws for over 30 years, there have been no significant improvements in the levels of cross-border public procurement activity. It is clear that EU strategies designed to level the playing field for SMEs competing for cross-border contracts have not been as effective as intended. The process of creating common rules for the conduct of public tendering across the EU has failed to address the serious obstacles to cross-

¹²¹ Gary Clifford and Dermot Cahill, 'Public Procurement and Communication Barriers' (*Tenderwise* ICPS 2007) at: <<http://icps.bangor.ac.uk/tenderwise.php>> accessed 1/10/2019. This research was conducted as part of the Ireland/Wales INTERREG-funded *Tenderwise Project* (2004 – 2007) that assembled a wide range of tools that enabled two hundred small, medium and large companies to overcome tendering knowledge barriers and vulnerabilities. As part of this project a linguistic expert determined that the average reading age of SME personnel was of a significantly inferior reading level to that required to understand the highly complex language used in public tenders.

¹²² Malcolm Coles, 'Google's reading level scores for UK newspaper' (2017) at <<http://www.malcolmcoles.co.uk/blog/googles-reading-level-scores-newspapers/>> accessed 25/1/2018.

¹²³ n 6.

border procurement posed by NTBs, and it would be futile to expect any cross-border progress to take place unless radical liberalisation steps are implemented, much like the ones proposed in our framework. Consequently, there is a disconnection between globalisation trends and cross-border public procurement within the EU. If remedied, more cross-border competition will not only benefit SMEs, but also contracting authorities, particularly if a more diverse pool of economic operators come forward in more significant numbers, as it has been proven that they can offer better value for money, lower costs, and a higher degree of innovation and delivery, via increased competition and globalised market forces.

Whilst the statistical information explored within this article identifies that current EU policies on transparency, competition, and openness are, numerically, providing to be largely ineffective at transnational level, our framework proposes a new way forward to remedy the limitations of the current EU Directives.¹²⁴ If our proposed framework is implemented, such, combined with new intuitive and emerging technologies could be a significant driving force for change in this area. Embracing new technologies in the fashion proposed by our framework, contract opportunities that seemed out of reach geographically, could imminently only become a click away.

This article provides several suggestions as to how the identified deficiencies can be remedied via practical and technological solutions. For example, to aid the search ability of cross-border contracts, this article proposed how an upgraded geo-location tool, incorporated into TED, could significantly stimulate transnational trade, by making opportunities ‘over the border’ visible and easy for SMEs to find in a pictorial format. Similarly, in constructing the balanced scorecard tool we examined some of the critical decisions a SME should address when pursuing a cross-border public procurement opportunity, using a mathematical model to help with better decision-making. The article then proposed evidence-led suggestions to help guide SMEs to make better decisions to boost their chances of the likelihood of winning public contracts in another jurisdiction, by utilising the benefits offered by a consortium-based approach. For SMEs based in the EU, it would make good strategic sense for an SME to partner with an indigenous partner, to improve their chances of winning those lucrative cross-border opportunities. We also make proposals on how to improve the accessibility of tender documentation, and this should be particularly helpful to SME personnel, by improving the readability of such contract notices. Subjecting tender documentation, including contract advertisements, to a literacy and readability standardisation test will ensure that the tender documentation becomes more accessible to a wider supply base.

Another recommendation that we make is the elimination of the multiplicity of national tender portals, such that the sole portal for bidding for public sector contracts would be the “TED-Plus” portal. By confining the use of national portals to merely acting as advertising vehicles, which feed back to the TED-Plus portal, it will significantly help increase the visibility of contracts ‘over the border.’ This will eliminate the current problem whereby a lot of sub-threshold tenders are advertised in national portals, but never appear on TED.

If such is recognised as being an effective means for remedying the perceived ‘home-bias’ perceptions held by SMEs, such may form the basis for future EU legislative reform. Specifically

¹²⁴ n 5.

measures to curtail the anti-integrationist growth of 'buy national' and intra-jurisdictional national portals for awarding below-threshold contracts are required, accompanied by a requirement to legally compel all EU Member States to advertise all public contract opportunities (both above and below threshold values) openly and fairly for all economic operators and SMEs on equal footing, irrespective of nationality, and thus take greater steps towards achieving a truly single, borderless, market and reinforce the founding, primary, objectives of European Union law.